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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1935

No. 360

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

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ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Appellate Court of Illinois, First District, although in writing, was not ordered published, and it is, therefore, not reported anywhere.

The Supreme Court of Illinois on the first appeal orally transferred the case to the Appellate Court because the constitutional and Federal questions had not been properly preserved, but filed no written opinion.

On the petition to the Supreme Court of Illinois for certiorari to the Appellate Court, no opinion was filed, but the writ of certiorari was denied.

Jurisdiction.

The jurisdiction of this court is invoked by petitioner under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 937, 28 U. S. C. A., Section 344).

We respectfully submit that this Honorable Court has no jurisdiction to grant the writ of certiorari prayed for by petitioner.

On December 5, 1933 the trial court (Circuit Court of Cook County, Illinois) entered a judgment for the respondent and against the petitioner upon an award of reparation previously made by the Illinois Commerce Commission. The petitioner herein instead of appealing to the Appellate Court of Illinois, which is the intermediate reviewing court in this state, appealed directly to the Supreme Court of Illinois. A direct appeal lies to the Supreme Court where constitutional questions have been raised. In that court the petitioner in its assignment of errors and in its briefs claimed that it had been deprived of its rights under the Commerce clause and the Fourteenth Amendment to the United States Constitution, as well as of rights under various sections of the Illinois constitution.

No such rights had been claimed in the trial court and the record brought up to the Supreme Court of Illinois did not disclose that such questions had been properly preserved for review. The case was argued orally before the Supreme Court of Illinois and the question of the preservation of such constitutional questions was thoroughly discussed. The Supreme Court thereupon orally

announced as stated in the Petition herein (page 20) that no constitutional questions had been properly presented to the trial court or preserved in the record for review, and therefore transferred the case to the Appellate Court.

That the Supreme Court of Illinois was correct in its refusal to consider any constitutional questions is clearly apparent from the record. The only facts disclosed by the record upon which the petitioner bases its contention that these constitutional questions were presented to the trial court are as follows:

(a) The petitioner in a notice of special defense alleged that "said rates were published and collected by said defendant pursuant and in obedience to an order entered January 11, 1921 by Interstate Commerce Commission in the proceeding designated as No. 11703 * * * that Illinois Commerce Commission is without jurisdiction or authority to penalize said defendants or to award damages or reparations against them for their said acts pursuant and in obedience to said order of Interstate Commerce Commission and that this court is likewise without such jurisdiction and authority" (R. 16-17).

(b) The petitioner introduced in evidence before the trial court the report and order of the Interstate Commerce Commission in said No. 11703 (R. 217-237).

(c) The petitioner moved to find the issues for the defendant at the close of the evidence (R. 266) and made a motion in arrest of judgment (R. 268).

We respectfully submit that in none of these three methods did the petitioner sufficiently present to the trial court the Federal questions which would give this Court jurisdiction to grant the writ of certiorari, for the following reasons:

A. The necessity of properly presenting to the trial court Federal questions which will give this Honorable Court jurisdiction to grant a writ of certiorari to the state court under Section 237 (b) of the Judicial Code is governed by the practice of the particular state where the case is tried.

Morrison v. *Watson*, 154 U. S. 111, 14 S. Ct. 995, 38 L. Ed. 927.

In the *Morrison* case this court said (U. S. p. 115):

> "If it (a title, right, privilege or immunity claimed under the constitution or a treaty or statute of the United States) was not claimed in the trial court, and therefore, *by the law and practice of the state*, as declared by its highest court, could not be considered by that court; * * * it cannot be asserted in this court." (Italics supplied.)

B. The manner in which a Federal question must be raised in the trial court in order to give this Court jurisdiction to grant certiorari is also governed by the state practice.

In *Louisville & Nashville R. Co.* v. *Woodford*, 234 U. S. 46, 34 S. Ct. 739, 58 L. Ed. 1202, it was contended that the Federal questions had been sufficiently presented to the trial court because they had been argued orally. The Kentucky Code of Practice required such contentions to be in writing. This Court, in holding that it was without jurisdiction to review the decision of the Supreme Court of Kentucky, said (U. S. p. 51):

> "In making this holding, the Kentucky court but enforced a rule of practice of that state. The decisions of this court not only have repeatedly held that a Federal right, in order to be reviewable here, must be set up and denied in the state court, but have often

held that such claim of denial is not properly brought to the attention of this court where it appears that the state court declined to pass upon the question because it was not raised in the trial court, as required by the state practice."

In *Hulbert* v. *City of Chicago,* 202 U. S. 275, 26 S. Ct. 617, 50 L. Ed. 1026, this Court was requested to review the judgment of the Supreme Court of Illinois, affirming a judgment of the County Court of Cook County confirming an assessment to defray the cost of paving a street. In the trial court the defendant filed objections to the confirming of the assessment roll, alleging that the Local Improvement Act of the State of Illinois, the ordinance passed by the City for paving the street, and the proceedings in the case were contrary to the Fourteenth Amendment to the United States Constitution because they sought to deprive the objector of property without due process of law. Upon the trial of the case the objector failed to bring these contentions to the attention of the trial court. This Court, in holding that it had no jurisdiction to review these Federal questions, said (U. S. p. 280):

"The mere claim in the objections to the confirming of the assessment, never afterwards brought to the attention of the trial court or of the supreme court, was not sufficient. There is no evidence in the record to show that the decision of either of the courts was invoked by plaintiff in error upon a right claimed under the Constitution of the United States.

• • •

"Nor was a right under the Constitution of the United States necessarily involved in the determination of the cause. And the supreme court was justified by

its rulings in omitting the consideration of rights under the Constitution of the United States. According to the practice of the court, an error not assigned is not open to review. *Berry* v. *Chicago*, 192 Ill. 154, 155, 61 N. E. 498. Errors assigned, but not noticed or relied on in the brief or argument of counsel, will be regarded as waived or abandoned. *Keyes* v. *Kimmel*, 186 Ill. 109, 114, 57 N. E. 851. *And such rule of practice will be recognized by this court.* *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 153, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605. It follows that this court has not jurisdiction of this writ of error." (Italics supplied.)

Petitioner (Brief, page 31) contends that this Court has held that whether the Federal constitutional questions were properly raised in the trial court is itself a Federal question. The decisions on that subject mean no more than that this Court will examine the record to see whether or not the State rules of practice requiring the questions to be raised in the trial court were complied with. These decisions do not mean that this Court will not follow the State rules of practice.

Even such examination of the record by this Court will be limited merely to considering whether or not there was a reasonable ground for the decision of the State Supreme court to the effect that the State rules of practice were not properly complied with. It is only when this Court can see that the State Supreme Court sought to *evade* the Federal questions that it will overrule the State Supreme Court in that respect.

In *Louisville & Nashville R. Co.* v. *Woodford*, 234 U. S. 46; 34 S. Ct. 739; 58 L. Ed. 1202, *supra*, this Court, after holding that the State practice was controlling, further said (U. S. p. 51):

"In this case there is no reason to believe that there was an attempt on the part of the state court to evade the decision of Federal questions, duly set up, by unwarranted resort to alleged rules under local practice, and upon this point this case comes within former rulings of this court, as we have seen."

The writ of certiorari can be awarded in this case only on the basis that the Illinois Supreme Court deliberately sought to evade the Federal questions. To justify such a charge would, we respectfully submit, require very clear and convincing proof in the record. The record is wholly barren of such proof. On the contrary, as we shall demonstrate, the record clearly shows that the Supreme Court of Illinois was entirely correct in ruling that the Federal questions had not been properly preserved in the trial court.

C. Under the rules of practice prevailing in the State of Illinois, the Federal questions were not properly presented to the trial court nor properly preserved in the record for review by the Illinois Supreme Court.

The Illinois Practice Act (Cahill Ill. Rev. Stat., 1931, Ch. 110, Sec. 118), which governed the appeal from the trial court, provided as follows:

"Appeals from and writs of error to circuit courts * * * in all criminal cases above the grade of misdemeanors and cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved * * * shall be taken directly to the Supreme Court."

It has always been the well settled rule of practice in Illinois that where an appeal is taken directly to the Supreme Court under the above section of the Practice Act on the ground that the validity of a statute or the construc-

tion of the Illinois or Federal Constitution is involved, the record must clearly show that the question was presented and argued in the trial court in order to be reviewable by the Supreme Court of Illinois.

Thus in *People* v. *City of Waukegan*, 344 Ill. 60, 175 N. E. 780, the Supreme Court of Illinois said (Ill. p. 61):

> "A cause cannot be brought directly to this court from the trial court, either by appeal or writ of error, upon the ground that the validity of a statute is involved unless the record discloses that the question was presented to the trial court for decision and preserved for review."

In *Cummings* v. *The People*, 211 Ill. 392, 71 N. E. 1031, the court said (Ill. p. 402):

> "It is fundamental that the question of the constitutionality of a statute cannot properly be raised for the first time in a court of review, but must have been called to the attention of the trial court and ruled upon by it, and the person challenging its validity must have preserved proper exceptions to such ruling."

The methods by which such questions may be presented to the trial court have been defined by the Supreme Court of Illinois. These methods are as follows:

1. Where a cause of action set forth in a declaration is based upon a statute a general demurrer will call into question the validity of that statute.

Christy v. *Elliott*, 216 Ill. 31; 74 N. E. 1035, where the Court said (Ill. p. 37):

> "This court has held that the constitutionality of a statute may be raised by demurrer to the declaration. (*Shepherd* v. *City of Sullivan*, 166 Ill. 78; *Woodruff* v.

Kellyville Coal Co., 182 *id.* 480.) Here, however, no demurrer was filed to the declaration. This court has also held that the constitutionality of a statute may be raised by an objection to evidence offered under it. (*Pearson* v. *Zehr*, 125 Ill. 573.) Here, no objection was made to the introduction of any testimony by the appellant upon the ground that the statute was unconstitutional, so far as the bill of exceptions shows."

2. Objections to evidence offered under a statute upon the ground that the statute is unconstitutional will raise the constitutional question.

Christy v. *Elliott*, 216 Ill. 31; 74 N. E. 1035, *supra*.

3. In a case tried before a court without a jury, as was our case, the questions may be presented by submitting propositions of law embodying such questions.

Opaque Cloth Shade Co. v. *Veight*, 161 Ill. 337, 43 N. E. 1067, where the court said (Ill. p. 338):

"If the defendant desired to raise the question here discussed, it should have raised it in the trial court by submitting proper propositions to be held as the law of the case."

Tested by these rules, it is apparent that the Supreme Court of Illinois correctly refused to review any Federal or constitutional questions because they had not been presented to the trial court. No demurrer to the declaration was filed by the petitioner. (Even if a demurrer had been filed, the rule contended for above would not be applicable to the case at bar because the Federal or constitutional questions did not appear from the declaration itself, but required a plea and the introduction of evidence to raise them.)

The petitioner made no objections to the introduction of evidence under any Federal statute. Even if it had

made such objections, it would have been necessary expressly to state the ground of its objection.

Petitioner submitted no propositions of law embodying the Federal or constitutional questions.

The mere fact that the petitioner's special plea contained allegations under which it might have questioned the validity of the orders of the Illinois Commerce Commission under the Commerce clause of the United States Constitution or might have claimed that it was being deprived of property without due process of law under the Fourteenth Amendment to the United States Constitution is no sufficient showing that the petitioner actually did present and argue such defenses to the trial court.

Thus in *Pearson* v. *Zehr,* 125 Ill. 573, 18 N. E. 204, the court in holding that it had no jurisdiction to consider the validity of a statute, said (Ill. p. 576):

> "It is quite apparent that the validity of the statute might have been involved in this suit, as, for instance, if the plaintiff had demurred to the plea setting up the statute, or had objected to the introduction of evidence under the statute, and the court having decided against him, he had excepted to the ruling and assigned it as a cross error. But a constitutional provision designed for the protection, solely, of the property rights of the citizen may be waived by the citizen."

The record clearly discloses that at no time during the trial of the case was the trial court in any way advised or informed, nor did it in any way know or believe, that the petitioner herein was challenging the validity of any state or Federal statute or claiming a violation of its rights under either the Illinois or Federal constitution. It is certainly clear beyond any doubt that the trial court did

not *rule* upon any of such questions. *Cummings* v. *The People,* 211 Ill. 392, 71 N. E. 1031, *supra,* specifically holds that to preserve the question for review in the Supreme Court, the record must disclose not only that it was presented to and argued before the trial court, but that the trial court *ruled upon it* (See quotation from this opinion, p. 8, *supra*).

Petitioner's contention that its introduction in evidence of the report and order of the Interstate Commerce Commission in docket number 11703 raised a Federal question is so far fetched as hardly to merit reply. The first obvious answer thereto is that if the reference in the notice of special defense to such report and order is insufficient to raise the Federal question, the introduction thereof in evidence without any explanation of the purpose of its introduction is no more effective to raise such Federal question. Secondly, the introduction in evidence thereof is quite consistent with the defense that the Illinois Commission was without jurisdiction under a proper construction of the Illinois Public Utilities Act, or the general decisions of the State of Illinois, to grant reparation. Such defense would raise no Federal question.

D. Such a defense may be waived by the litigant.

See *Pearson* v. *Zehr,* 125 Ill. 573, 18 N. E. 204, *supra,* where the Supreme Court of Illinois held that the constitutional provision may be waived by not presenting the question to the trial court for its decision.

See also *Hulbert* v. *City of Chicago,* 202 U. S. 275, 26 S. Ct. 617, 50 L. Ed. 1026, *supra,* where the defendant specifically raised the constitutional question in his pleading, but did not call it to the attention of the trial court or secure a ruling of the trial court thereon, and this Court held the question to have been waived.

Even, therefore, if the notice of special defense above quoted can be construed as actually raising the Federal questions relied on in the petition herein (and we shall hereafter show that it cannot so be construed), the record discloses that such defenses were waived by the petitioner because they were not presented to the trial court for decision in any proper manner.

E. The decisions of this Court confirm the rules of practice laid down by the Illinois Supreme Court with reference to the proper manner of raising a Federal question in the trial court.

In *Erie Railroad* v. *Purdy* 185 U. S. 148, 22 S. Ct. 605, 46 L. Ed. 847, the answers filed by the defendant in the trial court set forth that the statute relied upon in the declaration was unconstitutional and void because it was a violation of the Commerce clause of the Constitution of the United States and "because it is in violation of various other provisions of the Constitution of the United States and of the Constitution of the State of New York." This Court held that while the answer was sufficient to bring into question the validity of the statute insofar as the Commerce clause was concerned, the general reference to "other provisions of the Constitution" was not sufficient to raise the question of the validity of the statute under the Fourteenth Amendment.

In *Keokuk & Hamilton Bridge Co.* v. *Illinois,* 175 U. S. 626, 20 S. Ct. 205, 44 L. Ed. 299, this Court held that claim of a right under the Commerce clause of the Federal Constitution made in an Illinois state court did not confer jurisdiction to consider a claim of a right under the Fourteenth Amendment. The court said (U. S. p. 633):

> "To justify our taking jurisdiction, the Federal question must be specially set up or claimed in the state court; the party must have the intent to invoke

> for the protection of his rights the Constitution or some statute or treaty of the United States, and such intention must be declared in some unmistakable manner. *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709."

In *Layton* v. *Missouri*, 187 U. S. 356, 23 S. Ct. 137, 47 L. Ed. 214, the defendant was convicted of a violation of a statute of Missouri relating to the use of chemicals in the preparation of food. The court refused to review a decision of the Supreme Court of Missouri, saying (U. S. p. 358):

> "While it appears from the proceedings on the trial and the grounds assigned for the motion for new trial, that the unconstitutionality of the act was relied on in defense, the record does not show that it was contended in the trial court that the act was in contravention of the Constitution of the United States; and it is settled that the objection in the state courts that an act of the state is 'unconstitutional and void' relates only to the power of the state legislature under the state Constitution. *Miller* v. *Cornwall R. Co.*, 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Jacobi* v. *Alabama*, 187 U. S. 133, *ante*, 106, 23 Sup. Ct. Rep. 48."

See also *Jacobi* v. *Alabama*, 187 U. S. 133, 23 S. Ct. 48, 47 L. Ed. 106, to the same effect.

With these authorities in mind a detailed examination of the Federal questions relied upon will further emphasize the correctness of the Illinois Supreme Court ruling that none of these questions was properly raised in the state courts:

1. Petitioner first contends that the case involves the construction of Sections 13(4) and 15a(2) of the Inter-

state Commerce Act (48 U. S. C. A. Sections 13(4) and 15a(2).) An inspection of the record shows that these two sections of the Interstate Commerce Act were never at any time referred to in the trial court. Certainly the allegation in the notice of special defense that the Illinois Commerce Commission was without jurisdiction or authority to award reparation does not raise the question of the construction of these sections of the Interstate Commerce Act in the manner required by the above decisions. Applying the principle enunciated in *Layton* v. *Missouri*, 187 U. S. 356, 23 S. Ct. 137, 47 L. Ed. 214, *supra*, and *Jacobi* v. *Alabama*, 187 U. S. 133, 23 S. Ct. 48, 47 L. Ed. 106, *supra*, this Court must presume that this special defense merely raised the question of the construction of the Illinois Public Utilities Act and the power of the Illinois Commerce Commission thereunder to grant reparation.

But even if it be conceded for the sake of argument that the construction of those sections of the Interstate Commerce Act were sufficiently presented to the trial court, yet the petitioner waived this defense because upon appeal to the Supreme Court of Illinois it neither assigned errors bringing into question the construction of these sections of the Interstate Commerce Act (R. 270-275), nor did it in its briefs filed with the Illinois Supreme Court, nor upon oral argument before the Supreme Court, contend that the construction of these sections was in issue.

Hulbert v. *City of Chicago*, 202 U. S. 275, 26 S. Ct. 617, 50 L. Ed. 1026

The People v. *Cobb*, 343 Ill. 78, 83

This alleged defense is an obvious afterthought which was never at any time prior to the filing of the petition herein raised by petitioner.

Substantially the same answer may be made to petitioner's contention (Brief, p. 30) that the construction of Sec.

208 (a) of the Transportation Act, 1920, is involved. Nowhere in the record does it appear that such question was presented to the trial court, or ruled upon by it. Even if it had been so presented, the question was waived because no errors were assigned in the Supreme Court of Illinois challenging the construction of said Act.

2. Under Point II of petitioner's brief (Pages 41-42) it is contended that a violation of the Fourteenth Amendment to the Constitution and of the Commerce Clause of the Constitution is involved by reason of the alleged fact that the Illinois Commerce Commission awarded reparation on rates which were previously authorized by it. As a matter of fact, the Illinois Commerce Commission did no such thing, as we shall show later; but even if it did, no constitutional question would be involved thereby.

In *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358; 53 S. Ct. 145; 77 L. Ed. 360, this Court stated that whether or not a Railroad Commission, state or federal, has power to award reparation upon rates previously authorized by it is a question solely of the construction of the statute and does not involve any question of constitutional law. In discussing *Arizona Grocery Co.* v. *Atchison T. & S. F. R. Co.*, 284 U. S. 370; 52 S. Ct. 183; 76 L. Ed. 348, which held that where the Interstate Commerce Commission has upon complaint and after a hearing prescribed a particular rate, it cannot thereafter grant reparation for charges based upon the exaction of such rate, the Court said (U. S. p. 362):

> "The opinion of the court does not speak of the constitution, but plants itself upon the statute, and from that source and no other derives its energy. In none of its pages is there a hint, much less a holding, that a denial of due process would result from the declaration of provisional rates if the will to make

them provisional had been written into the Commerce Act, and written there in advance of carriage and of payment."

It is elementary that a decision of a state court *construing* a state statute raises no Federal question. *Lloyd* v. *Matthews,* 155 U. S. 222, 15 S. Ct. 70, 39 L. Ed. 128.

But even if a Federal question were involved, yet the record discloses that it was never raised in the trial court. The notice of special defense makes no reference whatever to any previous order of the Illinois Commission. No propositions of law with reference to the question were presented to the trial court. There is absolutely nothing in the record to show that the attention of the trial court was directed to the question of whether or not the petitioner's rights under either the Commerce Clause or the Fourteenth Amendment were violated by reason of any previous order of the Illinois Commission.

3. Under Point III. of its brief (Pages 43-44), petitioner claims that its property has been taken without due process in violation of the Fourteenth Amendment, because the order of the Illinois Commission granting reparation is alleged to be unsupported by the evidence.

It is clear that such claim was never presented to the trial court. The notice of special defense says nothing whatever about the insufficiency of the evidence before the Illinois Commission.

The motion by the petitioner at the close of the evidence to find the issues for the defendant and the motion in arrest of judgment specify no grounds whatever for such motions, and therefore were insufficient to present petitioner's claim of a violation of its rights under the Fourteenth Amendment.

Petitioner in its brief (Page 33) cites *Consolidated Coal Co.* v. *Illinois*, 185 U. S. 203; 22 S. Ct. 616, 46 L. Ed. 872, as supporting the proposition that "a motion in arrest of judgment may raise a Federal constitutional question." Petitioner has evidently overlooked the fact that in the motion in arrest of judgment made in that case "the invalidity of the statute was specially set up upon the ground of its repugnancy to the Fourteenth Amendment to the Constitution." (185 U. S. 206)

Petitioner having failed to claim in the trial court a violation of its rights under the Fourteenth Amendment because of the alleged insufficiency of the evidence, the Illinois Supreme Court was correct in refusing to review such question, and this Court is, therefore, without jurisdiction to review it.

4. Under Point IV of petitioner's brief (Pages 45-48), it is contended that the petitioner has been deprived of its property without due process of law by reason of the language in the opinion of the Appellate Court construing Section 68 of the Illinois Public Utilities Act (Cahill Ill. Rev. Stat., 1931, Chapter 111(a), Section 87; Smith-Hurd Ill. Rev. Stat., Chapter 111⅔, Section 72). While the Appellate Court interpreted Sec. 68 as depriving the petitioner of the right to litigate the question of the reasonableness of the rates involved because of petitioner's failure to appeal from the first order entered by the Illinois Commission finding the assailed rates unreasonable and prejudicial (R. 319), this interpretation is a mere *obiter dictum*, inasmuch as the Appellate Court did in fact examine the evidence and decide the case upon the merits, saying (R. 319):

> "Nevertheless we have examined the evidence and think it sufficient to sustain the findings, and we have

examined the findings and hold the same sufficient to justify the order for reparation."

The detailed and careful analysis in the opinion (R. 310-315) of all material facts contained in the record is further and convincing evidence that the Appellate Court considered and decided the case on its merits.

Petitioner was, therefore, not denied a hearing before the Appellate Court on the merits of the case, and the opinion of the Appellate Court did not deprive petitioner of property without due process of law.

This Court will not assume jurisdiction of a case in order to review a mere *dictum* of a State court.

This Court said in *Rutland Railroad Company* v. *Central Vermont Railroad Company,* 159 U. S. 630, 16 S. Ct. 113, 40 L. Ed. 284 (U. S., Page 640):

> "It is well settled, by a long series of decisions of this court, that where the highest court of a state, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground not involved in a Federal question, and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question."

It is, of course, quite evident that the petitioner was accorded a trial upon the merits by the *trial* court, inasmuch as the trial court received and considered all the evidence offered by the petitioner.

ARGUMENT.

I.

The petition for certiorari filed herein should be dismissed for failure to comply with the rules of this Court.

Rule 38 of this Court as amended June 4, 1934, requires that a petition for certiorari "shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed."

Petitioner has not filed any transcript of the record in this case. It has filed only a copy of the *abstract* of the record which was filed in the Supreme Court of Illinois. An abstract, needless to say, is not a transcript, but is a very abbreviated portion of the transcript.

It is of great importance in this case that the entire record be before the Court and that it should include the proceedings in the State, Supreme and Appellate courts. In our argument under "Jurisdiction" we pointed out that some of the Federal questions which petitioner contends are presented for review by this Court were not only not presented to the trial court, but were not saved for review by the Supreme Court of Illinois because not argued in the briefs. The burden being upon the petitioner to show that this Court has jurisdiction, it was petitioner's duty to include in the record and proceedings in the State courts the briefs filed by petitioner in those courts so that this Court might determine whether or not it had jurisdiction. We, therefore, respectfully submit that this Court

should dismiss the petition filed herein for failure to comply with the above rules of Court.

II.

This case has no widespread or public interest.

The litigation in the case at bar has arisen out of a situation created by the period of Federal control during the World War. That situation has long since passed and it is extremely unlikely that any further litigation therefrom will ever occur. The Illinois Supreme Court and the Illinois Appellate Court apparently considered the case of insufficient importance to warrant publication of their respective opinions. We respectfully submit that under these circumstances the time and energy of this Court should not be expended in reviewing the case.

III.

The Illinois Commerce Commission was not precluded from granting reparation by any previous order of the Interstate Commerce Commission.

The first question which petitioner contends is presented by the case (Petition, Pages 2, 23; Brief, Page 37) is whether a State Commission has power to grant reparation for the exaction of rates which were previously fixed by the Interstate Commerce Commission. This question is neither new nor novel and has been many times decided by this Court, commencing with the *Shreveport* case (*Houston East & West Texas Railroad Co.* v. *United States*, 234 U. S. 342; 34 S. Ct. 833; 68 L. Ed. 1341).

The difficulty with petitioner's contention, however, is that the *facts* in this case do not bring it within the doctrine announced by the *Shreveport* case since the Interstate Commerce Commission did not fix the rates in question. The order of the Interstate Commerce Commission in *Ex Parte* 74 and in Docket 11703 merely established a general level of rates throughout the United States and throughout the State of Illinois, respectively. No *specific* rates were fixed. This was definitely decided in *Brimstone R. R. & Canal Co.* v. *United States of America*, 276 U. S. 104; 48 S. Ct. 282; 72 L. Ed. 487, and *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 51 Fed. (2d) 443, certiorari denied 284 U. S. 675; 52 S. Ct. 130; 76 L. Ed. 571. No specific rates on brick from Bernice, Illinois, having been previously fixed by the Interstate Commerce Commission, the award of reparation by the Illinois Commission in no way conflicted with the power of the Interstate Commerce Commission, and the doctrine of the *Shreveport* case has no application. The right of a State Commission to fix intrastate rates or grant reparation thereon in the absence of any previous decision of the Interstate Commerce Commission cannot be questioned.

IV.

The Illinois Commerce Commission was not precluded from granting reparation by any previous order of its own.

It is further contended (Petition, Page 23; Brief, Page 41) that the question is presented whether the petitioner was deprived of property without due process by reason of the alleged fact that the Illinois Commerce Commission awarded reparation on rates which were previously authorized by the *Illinois* Commission.

The answer to that contention is twofold: First, the Illinois Commission did not in fact authorize the rates in question. The only order entered by it on which petitioner bases this contention was the order in Docket 10620 (R. 210-217). This order followed the order of the *Interstate* Commerce Commission in *Ex Parte* 74, and merely prescribed a general advance in Illinois *state* rates commensurate with the general advance in *interstate* rates authorized by the Interstate Commerce Commission in *Ex Parte* 74. Since the Interstate Commerce Commission was not precluded by *Ex Parte* 74 from awarding reparation, *Brimstone R. R. & Canal Co.* v. *United States of America,* 276 U. S. 104; 48 S. Ct. 282; 72 L. Ed. 487, and *Eagle Cotton Oil Co.* v. *Southern Ry. Co.,* 51 Fed. (2d) 443, certiorari denied 284 U. S. 675; 52 S. Ct. 130; 76 L. Ed. 571, it necessarily follows that the order of the Illinois Commission in Docket 10620 did not preclude the Illinois Commission from granting reparation in the case *sub judice.*

Secondly, as we have already indicated, this Court has held that even if the Commission had previously authorized the particular rate upon which it later granted reparation, the question of its power to grant such reparation would not involve any constitutional question but merely a construction of the statute, *Great Northern Ry. Co.* v. *Sunburst Oil Refining Co.,* 287 U. S. 358; 53 S. Ct. 145; 77 L. Ed. 360, and this Court has no jurisdiction to review the decision of the State court construing the Illinois Public Utilities Act.

V.

The award of reparation was amply supported by evidence before the Illinois Commerce Commission.

The third reason relied upon by petitioner for review (Petition, Page 24; Brief, Page 43) is its contention that the award of reparation is not supported by the evidence and that the rate upon which reparation was granted is confiscatory; therefore, it is contended that the petitioner was deprived of property without due process of law.

There was a very extended hearing before the Illinois Commerce Commission and a great deal of testimony taken. The cost figures which "are at best only rough approximations", *American Fruit Growers Inc. of California, et al.* v. *Southern Pacific R. R. Co.*, 134 I. C. C. 639, contained many disputed items, as the Illinois Commission stated in its order (R. 47). After carefully considering all evidence before it, including the cost study, the Illinois Commission found that fifty cents per ton "provided adequate revenue for the transportation of brick from Bernice, Illinois" (R. 48).

That this finding of the Commission was justified and that petitioner's cry of "confiscation" is, to say the least, insincere, is confirmed by the fact that the fifty cent rate had previously been *voluntarily* put into effect by the petitioner itself. The order of the Interstate Commerce Commission in Docket 11317 (R. 125) merely required petitioner to remove the discrimination between the rates from points outside the district and rates within the district itself as applied to interstate movements. Petitioner under this order could have raised the rates within the district on interstate movements. Instead it voluntarily reduced the rates from Bernice to fifty cents per ton on interstate movements and then also voluntarily reduced the *intra*-state rate

from Bernice to fifty cents per ton. It is very difficult to believe that the petitioner would voluntarily "confiscate" its own property.

VI.

The construction in the Appellate Court opinion of Section 68 of the Illinois Public Utilities Act is a mere dictum.

The fourth reason adduced by petitioner for review in this case (Petition, page 25; Brief, page 45) is that the Appellate Court of Illinois construed Section 68 of the Illinois Public Utilities Act as depriving petitioner of the right to be heard upon the merits of the case. As we have already indicated in our argument on Jurisdiction (page 17, *supra*), the Appellate Court did in fact decide the case on its merits, and therefore this part of the Appellate Court's opinion is mere *obiter dictum*, and neither furnishes ground for jurisdiction nor for the exercise of the discretion of this Court (if jurisdiction be found) to grant the writ of certiorari.

CONCLUSION.

We respectfully submit that the petition for certiorari should be dismissed for failure to comply with the rules of this Court requiring a certified transcript of the record to be filed with the Court; that this Court has no jurisdiction to review the judgment of the Supreme Court of Illinois and the Appellate Court of Illinois because the Federal questions relied upon were not presented to and passed upon by the trial court, and the Supreme Court of Illinois properly refused to review the same; that the case has no widespread or public interest, and that none of the Federal questions contended for by petitioner is actually presented by the record.

Respectfully submitted,

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